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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 663

JULIA OBARTUCH,

Petitioner,

vs.

SECURITY MUTUAL LIFE INSURANCE COMPANY,
A CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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SUMMARY OF ARGUMENT.

There are statements and arguments in the petition for certiorari which have not been re-argued in petitioner's brief. Logically, it seems best to answer first, the petition upon the facts and the law, then, to answer petitioner's

brief,—which we trust will be for the convenience of the Court.

We shall not cover the contentions or authorities discussed by the Circuit Court of Appeals because they are adequately answered in its opinions.

There are material misstatements of fact by petitioner and unwarranted inferences drawn therefrom; we shall call attention to some of the more important.

We shall show:

I.

THERE WAS NO LIMITATION OF THE ISSUES FOR TRIAL.

A. The only "limitation" was the repeated statement of plaintiff's attorneys that it was immaterial whether Frank Obartuch signed or not. As a matter of law, plaintiff could not change her position in the Court of Appeals and claim that the fact was material.

B. If Frank Obartuch did not knowingly sign, with understanding of the contents of the document, such a document is disregarded everywhere.

C. It is against public policy to allow one person to have insurance on the life of another, without the knowledge or consent of the latter.

D. The case being tried without a jury, the findings of the trial court must be taken as true.

II.

THERE WAS NO ERROR IN ADMITTING DR. RUBENS' TESTIMONY THAT THE APPLICATION WAS NOT SIGNED IN HIS PRESENCE.

A. There is a well recognized exception to the Parol Evidence Rule, that documents may be impeached for fraud.

B. Dr. Rubens' signature was attached merely as a testimonial; an attesting witness may always impeach his attestation.

III.

DR. RUBENS' TESTIMONY DID NOT IMPEACH DOCUMENTS INTRODUCED BY DEFENDANT-RESPONDENT.

IV.

THE DEFENSE OF SUBSTITUTION OF A PERSON OTHER THAN THE NAMED INSURED AT THE MEDICAL EXAMINATION, IS NOT PRECLUDED BY THE INCONTESTABLE CLAUSE UNDER THE LAW OF ILLINOIS OR ELSEWHERE.

A. Insurance companies insure lives, not names. Where there is a fraudulent substitution, if there is a contract it is with the person examined,—rather than with the person fraudulently named.

B. Where there is a mistake respecting the identity of a party to a contract, this is sufficient to invalidate it.

V.

PETITIONER HAS NOT SHOWN GROUNDS FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

I.

There Was No Limitation of the Issues for Trial.

The Court of Appeals considered this point as a question of fact, and decided it against the plaintiff-petitioner, quoting some of the record in a footnote (R. 738-9). The question was again reargued in plaintiff's petition for rehearing (R. 776, *et seq.*), and in the reply thereto (R. 803, *et seq.*).

If the question is to be reconsidered, we think it should be in the light of the full discussion.

Defendant did not initiate the talk as to whether it was material if Frank Obartuch signed the application. Michael Obartuch (plaintiff's son and one of her attorneys) began it. At the very start of the trial he said (R. 63):

> "Mr. Obartuch: Judge, I think it is all a question of law.
>
> "The Court: No, it is not. As I recall it, when I wrote those memoranda here, isn't it the case in which it was the claim of the defendant that they did not insure the man who was named in the policy, but someone else who was substituted for examination.
>
> "Mr. Bourland: Yes.
>
> "The Court: That is **one** of the defenses.
>
> "Mr. Bourland: That is right.
>
> "The Court: I remember that.
>
> "Mr. Bourland: Your Honor held with us on that, that that would constitute a defense, if we proved it.
>
> "The Court: Yes.
>
> "Mr. Bourland: And that is the **principal issue** in the case, whether we can prove it to your Honor's satisfaction.
>
> "The Court: I think I would want the advice of a jury in the matter.
>
> "Mr. Obartuch: Judge, I think in this case, under the rule of pre-trial practice, if what they say is true, **we need only submit one matter** to the Court, and if either one of us prevails on it I think that will eliminate the rest of all of the other things that are involved.

> That is about as I understand it, their only contention, is as to the substitution of a body. They do not contend that he did not sign it and I think under the pretrial practice that we can eliminate that and have the one issue tried and dispose of it in that way and save the court time."

A few minutes after Mr. Pearson came into the court room, he again brought up the matter and stated that it was "immaterial" whether the application "bears Mr. Frank Obartuch's signature" (R. 66). The defendant merely indicated that it was "inclined to agree" with these statements, that this fact was immaterial (R. 66). In other words, it was the plaintiff who undertook to limit the issue, not the defendant.

Then, as the Court of Appeals points out (R. 738-39) in the opening statement for the defense, it was plainly stated that the defendant did not know whether it was the genuine signature of Frank Obartuch or not, but that if he did sign the papers, he did not know what he was signing (R. 738). Again, before the examination of plaintiff's first witness this occurred (R. 97):

> "Mr. Pearson: Now, I would like to ask you further, counsel: In the statement at one time you intimated there was not any question about what Mr. Obartuch signed these various papers. Is there any question about that?
>
> "Mr. Bourland: I have never stated that. I have always said it was either a forgery or else he did not know what he was signing.
>
> "Mr. Pearson: Very well.
>
> "Mr. Bourland: I don't know which is true."

There were many other occasions upon which defendant's attorney, in the trial court, stated that the issue was whether Frank Obartuch knowingly signed. See collection of instances in reply to petition for re-hearing. (R. 803-4.)

Plaintiff first discovered this claim of waiver of defense when this case reached the Circuit Court of Appeals; it was not made in the trial court.

Defendant's counsel never did more than agree with plaintiff's attorneys that it was immaterial, as a matter of law, whether it was a genuine signature or not, the defendant contending at all times that if Frank Obartuch did sign, he did not know what he was signing. The trial court made a special finding of fact that if Frank did sign, he did not sign knowing the contents of the documents or with the intention of obtaining insurance from defendant company (R. 711, finding No. 2), also the following findings:

> "3. That the real Frank Obartuch, husband of the plaintiff herein, did not desire to take out insurance upon his life with the defendant company; that the policies were obtained by the sons of the said Frank Obartuch, and the plaintiff herein, without the knowledge or consent of the said Frank Obartuch and that the said Frank Obartuch died without knowledge that said insurance policies purporting to insure his life, had been issued. (R. 711-12.)
>
> * * * * *
>
> "7. That the plaintiff by agreement with her sons Michael Obartuch and Henry Obartuch and daughter Matilda Wiczas, obtained the policies in suit by the substitution of a person other than Frank Obartuch, which said person submitted to the medical examination of the defendant's doctor without the knowledge or consent of Frank Obartuch." (R. 712.)

A. When the plaintiff contended in the trial court that it was there immaterial whether Frank Obartuch signed or not, we submit that plaintiff could not change her position in the Court of Appeals and in this court and contend that it is here material.

In *Gering, et al.* v. *Leyda,* C. C. A. 8th, 186 Fed. 110, a similar attempted switch in positions was dealt with (pages 113-14):

> "The defendants below, by objecting to the proof of indebtedness of the bankrupt on the ground that such proof was immaterial and obtaining a ruling sustaining this objection, estopped themselves from claiming that evidence of such indebtedness was requisite to sustain the trustee's cause of action; notwithstanding

this ruling, sufficient evidence crept into the case to constitute substantial evidence of indebtedness of the bankrupt to general creditors not secured. * * *

"* * * If the showing made by the trustee in the trial court as to the extent of the bankrupt's indebtedness to general creditors was not as full as it might have been, the plaintiffs in error are not in a position to complain of the lack of evidence on this subject, for the trustee offered evidence tending to show the indebtedness of the bankrupt at the time of the transfer complained of, and plaintiffs in error objected to the admission of the evidence on the ground that it was immaterial and obtained from the trial court a ruling sustaining their objection. By taking this course the plaintiffs in error estopped themselves from claiming that evidence of the indebtedness of bankrupt to general creditors at the time he transferred his stock of goods to them was necessary to sustain the trustee's cause of action."

See also:

Standard Varnish Co. v. *Jay*, 149 Ill. App. 25-29.

The only evidence in this case as to whether or not it was really plaintiff's signature, in like manner, "crept into the case" when Matilda Wiczas, plaintiff's daughter, was on the stand (R. 98). Defendant introduced no testimony on the subject. Plaintiff's Exhibits 1 and 2, being the insurance policies, which contained photostatic copies of parts 1 and 2,—constituting the application for the policies—were introduced in evidence without objection, by the defendant. Mrs. Wiczas was asked whether the signature was her father's signature, under the guise that plaintiff might want to "call a handwriting expert" (R. 100). None was called.

Mrs. Wiczas was not a credible witness because she was one of the witnesses who testified she was present and that the man examined by the doctor was Frank Obartuch (R. 449). She was one of the witnesses referred to by the trial judge when he said "The testimony of many of the witnesses for the plaintiff is reeking with perjury" (R. 702).

The testimony of a perjurer certainly adds nothing worth while to the record.

We agreed with plaintiff's statement of the law that it was immaterial whether Frank Obartuch actually signed the application, for it would be strange law to hold that it made any difference if a man signed a document, if he did not do it knowingly.

The law is all to this effect.

B. A paper which is not signed knowingly with understanding as to its contents, is void and is disregarded everywhere.

In *Babcock* v. *Farwell,* 245 Ill. 14, at page 40 the Court said:

> "It is insisted on behalf of the appellant that it is not necessary in order to avoid a release obtained by actual fraud, to return the consideration therefor. This is true where the fraud was in procuring the execution of the release,—that is, where the party was induced to execute the instrument not knowing it to be a release but believing it to be an instrument of a different character. A release so obtained is void. (*Indiana, Decatur and Western Railroad Co.* v. *Fowler,* 201 Ill. 152.)"

The Court pointed out that in such case no contract was entered into and the release was absolutely void, saying:

> "In the former case no contract was entered into. The release was not the deed of the party signing it because **it was not knowingly executed by him.** It was void and no necessity existed for setting it aside. It might be disregarded anywhere."

We also cite to support this fundamental principle:

Sims v. *Bice,* 67 Ill. 88.

13 C. J., Section 252, page 373.

17 C. J. S., Section 140, page 495.

Ford Motor Co. v. *Pearson,* C. C. A. 9th, 40 F. (2d) 858, 867.

Williston on Contracts (1920 Ed.), Vol. III, Section 1488, page 2648.

C. It is against public policy to allow one person to have insurance on the life of another, without the knowledge or consent of the latter.

In *Metropolitan Life Ins. Co.* v. *Monahon,* 102 Ky. 13, 42 S. W. 924, Monahon brought action against the insurance company to recover money paid by plaintiff's wife to defendant company as premiums on a policy issued by the company on Monahon's life for the benefit of the wife. Plaintiff contended that the policy was issued and the premiums paid without his knowledge or consent; that he never had made any application for such policy, never had been examined by any physician and that his wife had paid the premiums with his money. On the question as to whether or not the policy had been issued without his consent, the court found that the evidence so showed, and said:

> "It is certainly against public policy for one to procure a policy of insurance on the life of another without such one's knowledge or consent. The wife has an insurable interest in the life of the husband; yet she could not obtain insurance upon his life without his knowledge and consent. Neither should the husband be allowed to procure a policy of insurance on the life of the wife without her knowledge and consent. If such practice was indulged, it might be a fruitful source of crime."

The judgment of the trial court for the plaintiff was reversed.

In addition we cite:

Acme Manuf. Co. v. *McCormick,* 175 N. C. 277, 95 S. E. 555, L. R. A. 1918 F. 572.

American Mutual Life Ins. Co. v. *Bertram,* 163 Ind. 51, 70 N. E. 258, 260.

37 C. J. (Life Insurance), page 381, § 45.

Couch's Cyc. of Insurance Law, Vol. 1, page 779, § 296.

As held by the Court of Appeals, the findings of the trial court that Frank Obartuch never knew that he signed applications for insurance, never wanted insurance, never knew he was insured, and that the policies were obtained by a conspiracy against the company by Frank's relatives, and that such conspiracy was contrary to public policy, are clearly sustained by the evidence, without the support of Dr. Rubens' testimony.

In *Railway Company* v. *Rock*, 279 U. S. 410, 73 L. Ed. 766, the plaintiff, whose true name was Joe Rock, obtained employment with the defendant railway company, by using the name John Rock, and having a man named Lenhart take the physical examination which was required by the railway company, because Rock knew that he could not pass the examination and had been previously rejected on a similar examination. He sued under the Federal Employers' Liability Act, recovered judgment in the Circuit Court for $15,000, which judgment was affirmed in the Appellate Court (247 Ill. App. 600), and certiorari was denied by the Supreme Court of Illinois. This Court granted certiorari and reversed without remanding the case, saying (73 L. E. 770):

> "Respondent's position as employee is essential to his right to recover under the act. He in fact performed the work of a switchman for petitioner, but he was not of right its employee, within the meaning of the act. He obtained and held his place through fraudulent means. While his physical condition was not a cause of his injuries, it did have direct relation to the propriety of admitting him to such employment. It was at all times his duty to disclose his identity and physical condition to petitioner. His failure so to do **was a continuing wrong in the nature of a cheat.** The misrepresentation and injury may not be regarded as unrelated contemporary facts. As a result of his concealment **his status was at all times wrongful,** a fraud upon the petitioner, and a peril to its patrons and its other employees. **Right to recover may not justly or reasonably be rested on a foundation so**

abhorrent to public policy, *N. Y. C. R. R. Co.* v. *Lockwood, supra; Great Northern R. Co.* v. *Wiles,* 240 U. S. 444, 448, 60 L. ed. 732, 734, 36 Sup. Ct. Rep. 406; *Stafford* v. *Baltimore & O. R. Co.* (D. C.) 262 Fed. 807."

The Illinois Criminal Code, Chap. 38, § 293, makes it a criminal act "to cause any person to be insured under an assumed name." There are other applicable provisions, such as the statutes against the "confidence game" and obtaining money under false pretenses.

It is uniformly held that a contract which is obtained by criminal means is contrary to public policy and therefore void, at least as to the parties to the conspiracy and to the criminal act. 17 C. J. Secundum, § 272, p. 656.

D. The case being tried without a jury, the findings of the trial court should be taken as true.

Applicable statutes, the rules of this court so provide, and the decisions of this court are all to this effect.

In fact, there is no assignment of error made here against the findings of the trial court.

Yet we find a one-sided statement of the evidence in the petition for certiorari, pages 5-10, and in the argument there is a studied attempt to lead this court to believe that there was only "an alleged substitution" and that the evidence was insufficient to show a criminal conspiracy on the part of plaintiff and her family.

We think we are entitled to start out with the premise contained in the findings of fact entered by the trial court, without discussing in detail the evidence.

These findings of fact were that Frank Obartuch was not the person examined, that if he signed the application and other papers, he did so without knowing the contents thereof, and without the intention of obtaining insurance; that he did not desire to take out insurance; that the poli-

cies of insurance were obtained by the sons of Frank Obartuch and the plaintiff, without the knowledge or consent of Frank Obartuch, who died without knowledge that said insurance policies purporting to insure his life had been issued (R. 711-12).

Further, that the defendant company intended to insure and did insure the life of the person who was examined by its doctor, and did not intend to insure, nor did it insure the life of Frank Obartuch; that the plaintiff, her sons and daughter, knew that the man examined was not Frank Obartuch; that Dr. Rubens, the medical examiner of the defendant, did not know that the person examined by him was not in fact Frank Obartuch nor did the defendant company at the time it issued the policies in suit know that the person examined by its medical examiner was not in fact Frank Obartuch; that the plaintiff, her sons and daughter, obtained the policies in suit by the substitution of a person other than Frank Obartuch, which person submitted to the medical examination of the defendant's doctor without the knowledge or consent of Frank Obartuch (R. 712).

Assuming these to be the facts that this court will consider, we will not discuss the evidence which supports the findings.

The Court of Appeals in its original opinion, said that there was sufficient evidence to support the findings, disregarding Dr. Rubens' testimony (R. 745):

> "The findings and conclusions complained of, however, find ample support in the testimony other than that given by the medical examiner."

After re-argument of the case upon petition for rehearing, the opinion of the Circuit Court of Appeals again calls attention to additional evidence than that of Dr. Rubens, to which no objection was made by plaintiff which

sustained the court's findings (R. 813-16). The court's opinion concluded:

> "A re-study of the record confirms our conclusion that the evidence supports the findings as made by the District Court, and that the findings support the judgment." (R. 817.)

II.

There Was No Error in Admitting Dr. Rubens' Testimony That the Application Was Not Signed in His Presence.

The certificate of Dr. Rubens was double in effect, (1) that he saw the applicant attach his signature, and (2) that he reviewed the answers with the applicant.

Dr. Rubens testified without objection and without contradiction of the document that the answers shown in parts 2 and 3 (R. 116-118), were answers made by the man examined; and further, without objection, that the photograph shown him of the real Frank Obartuch (R. 165) did not depict the man whom he had examined, who was represented to be Frank Obartuch (R. 112-113).

The Court of Appeals points out that neither side inquired of Dr. Rubens why the application was left with the person examined, or by whom it was presented to the doctor on the following day (R. 813-814).

At the trial when Dr. Rubens was being examined, defendant's attorney pointed out that he might be cross-examined as to how he happened to sign (R. 122) as follows:

> "Mr. Bourland: And they might cross-examine him about whether the statement is correct or how he happened to sign it, but he certainly is entitled to testify to the fact as to whether or not the man represented to be Frank Obartuch signed these documents."

For the defendant to ask its witness why he left the document with the supposed Frank Obartuch, would appear to

be cross-examination of its own witness. Apparently the reason why plaintiff did not cross-examine upon this subject is because Dr. Rubens was examined before trial by the plaintiff (R. 124). Apparently, plaintiff did not thereafter desire to again bring out the doctor's reasons for leaving the documents.

The fact that the doctor attested the signature which he did not actually see signed, is not to be commended, but it is a matter of common knowledge that this is frequently done by laymen and we might even say by lawyers,—that signatures are witnessed without sufficient assurance that they have been signed by the persons purporting to sign.

A. The opinions of the Court of Appeals (R. 744-816) show some of the authorities recognizing the well established exception to the Parol Evidence Rule where it is sought to impeach a written contract for fraud.

The statement as to the exception to the Parol Evidence Rule, quoted in the opinion, from 56 A. L. R. 86, has been cited with approval in more than one hundred cases. (See A. L. R. Blue Book of supplemental decisions, 1939 revision.)

This is not new law,—it was announced emphatically as early as 1872, in *Union Mutual Life Insurance Co.* v. *Wilkinson,* 80 U. S. 222 (13 Wall.), 20 L. E. 617-622.

See also Greenleaf on Evidence, 14th Edition, 1883, Sec. 284, p. 360.

B. Dr. Rubens' signature was attached merely as a testimonial; an attesting witness may always impeach his attestation.

Wigmore on Evidence, 1904 Edition, § 528, p. 658, states this further exception to the Parol Evidence Rule which has not been referred to by the Court of Appeals. It is important because it will be noted that Dr. Rubens signed merely in a testimonial capacity:

"§ 528: *Same: Attesting Witness contradicting his*

Attestation. The general notion that a person cannot be heard to repudiate his own formal assertion made on a former occasion was responsible for the attempt, often made during the 1600s and 1700s, to *forbid* an attesting witness to *repudiate* his attestation by swearing that, though he did attest the execution, yet in fact he attested falsely. But this doctrine, though repeatedly urged by counsel and though apparently in harmony with popular notions of the time, *was as constantly repudiated by the judges.* That the propounder of the will may, in spite of the attesting witnesses' denials, prove otherwise the genuineness of execution, involves a different principle, elsewhere considered (*post*, § 1302)."

In Sec. 530 he says (p. 663):

"*Same. Contradicting one's Own Official Certificate.* A notion almost identical with that underlying the rule of *Walton* v. *Shelly* has led to the argument that an official who has certified to a specific fact as known to him to have occurred will not be allowed to testify, in contradiction to the certificate, that the facts were otherwise than as certified: * * * (After quoting from *Briggs* v. *Stafford*, 14 La. o. s. 381.)

"*The notion has no better grounds for support here than elsewhere.* If the certificate is not absolutely conclusive (*post*, §§ 1345-1352) and may be otherwise shown to be incorrect, then the official *should be equally competent.* The official doubtless should be punished, but *not* the party needing his testimony. The official is clearly capable of falsification, but the *value* of his testimony should be left to the jury:"

Mr. Wigmore's 2d edition published in 1922 contains the same statement (§§ 528-530) with the citation of some additional cases, including two from Illinois, where it was held that the notary may impeach his certificate of acknowledgment:

Parlin & Orendorff Co. v. *Hutson*, 198 Ill. 389.
Union Colliery Co. v. *Fishback*, 299 Ill. 165.

See also:

22 Corpus Juris, p. 1215 *et seq.*, and sec. 1630, p. 1222, sec. 1645, p. 1233, sec. 1679, p. 1259.

Miller v. *Troy Laundry Machinery Co.*, (Okla.) 62 Pac. 2d 975-977.

American Bankers Ins. Co. v. *Hopkins*, (Okla.) 169 Pac. 489, 491-2.

III.

Dr. Rubens' Testimony Did Not Impeach Documents Introduced by Defendant-Respondent.

The facts are contrary to petitioner's argument on this subject.

Plaintiff introduced as her Exhibits 1 and 2 the two original insurance policies. To each of these policies was attached photostatic copies of parts 1 and 2, part 1 being the application (R. 79), and part 2 being entitled "Questions of Medical Examiner and Answers Thereto" (R. 78). For convenience the photostatic copy of part 2 is not shown at R. 78, but is referred to as being "the same as Defendant's Exhibit 5" (R. 118). Plaintiff offered in evidence parts 1 and 2 when she offered her Exhibits 1 and 2 (R. 68), and same were received without objection (R. 71).

The original document entitled "Part 3, Medical Examiner's Report" (R. 116), marked Defendant's Exhibit 4, was the reverse side of part 2, marked for identification as "Defendant's Exhibit 5" (R. 118). Part 3 was not attached to the policy nor was any copy of it attached. When part 3 was offered in evidence as Defendant's Exhibit 4, plaintiff objected to its introduction upon the ground that it was not a part of the policy (R. 109).

As it was not a part of the contract, there seems to be no good reason to claim that it comes within the Parol Evidence Rule.

In any event there was no attempt to contradict or impeach any part of Defendant's Exhibit 4 (part 3); on the other hand Dr. Rubens testified without objection by plain-

tiff, that the man he examined corresponded in every respect with every statement made in part 3. The evidence of all the other witnesses shows that Frank Obartuch did *not* correspond to the description given in the medical examiner's report, part 3; in other words, instead of our impeaching part 3 in any way, we relied upon the description in part 3 as being the description of the man examined, which definitely showed the substitution.

One of the strong points of our proof was that there was no conceivable reason for Dr. Rubens to describe, otherwise than correctly, the man he examined. The description and dimensions which he entered upon part 3 at the time of the examination, did not correspond to the description and dimensions of the real Frank Obartuch, as given by defendant's witnesses, nor to the description and dimensions of Frank Obartuch as given by plaintiff's own witnesses (largely members of his family) in their depositions before trial and in their testimony at the trial.

The reason why plaintiff's testimony as to the description and dimensions of Frank Obartuch did not correspond with part 3, is that part 3 was not attached to the policy. For, if plaintiff's witnesses had been able to refresh themselves by part 3, their willingness and aptitude for perjury would have made a conflict of testimony. But plaintiff was caught unaware of what Dr. Rubens reduced to writing at the time of the examination.

If Dr. Rubens had been a party to the conspiracy, he would have made the description of the man examined correspond with the real Frank Obartuch. This makes it self-evident that he was innocent, that his signature to part 2, attesting Frank Obartuch's signature, was obtained by fraud, as the Circuit Court of Appeals held (R. 814).

Bearing in mind that part 2 was introduced by plaintiff as a part of Plaintiff's Exhibits 1 and 2, let us see how it came to be marked as Defendant's Exhibit 5.

Dr. Rubens was shown the original document which was mainly in his handwriting. Part 3 was not signed by anybody except Dr. Rubens, whereas part 2 contains the signature "Frank Obartuch." For reference and identification the original document, part 3, was marked Defendant's Exhibit 4 and the reverse side, part 2 was marked Defendant's Exhibit 5 (R. 106-118).

In the first instance the insurance company's attorney offered the entire document saying (R. 108):

> "Mr. Bourland: I offer in evidence at this time, if your Honor please, Defendant's Exhibits 4 and 5, and will ask leave to substitute photostatic copies. There has already been introduced, your Honor, as parts of the insurance policies what are called parts 1 and 2. That is the photostat that is in the two insurance policies. Now on the reverse side of part 2 is part 3, which has not been introduced and is not attached to the insurance policy. This is what has been identified as the original documents."

Mr. Pearson, as attorney for the appellant, then objected to the introduction of part 3 upon the ground that it was not admissible, because it was not appended to the original policy.

At R. 110, Mr. Bourland stated:

> "Well, parts 1 and 2 are already in evidence. I *will withdraw* the originals of Defendant's Exhibits 4 and 5 and ask that the photostat of part 3 be identified as Defendant's Exhibit 4 and that the original part 3 be identified by the reporter as Defendant's Exhibit 4, both of them marked 4. But I will later ask leave to substitute the photostat instead of the original."

When Mr. Bourland renewed the offer of the exhibit, he offered *only* Defendant's Exhibit 4, which was part 3 (Tr. 114), and at Tr. 115 Mr. Bourland said:

> "I would like to substitute just the one page, a photostatic copy of it, Defendant's Exhibit 4. There has already been introduced part 2, a photostat, and which is part of the insurance policy."

The stenographer or person preparing the record, then indicated by his notation, that Defendant's Exhibits 4 and 5 were *both* received in evidence, and made the notation (or plaintiff's counsel did), as follows:

> "Defendant's Exhibits 4 and 5 are respectively part 3 and part 2 of the application of Frank Obartuch, the originals of which are on opposite sides of the same paper. The following are photostatic copies of said Exhibits 4 and 5."

It thus appears from this record that what was offered by Mr. Bourland was only part 3, Defendant's Exhibit 4.

Parts 1 and 2 were already in evidence as pleaded in the complaint, admitted in the answer, and expressly offered in evidence by plaintiff (Tr. 71-86), so that it is not now fair to say, any more than it has ever been fair to say, that the defendant offered or vouched for part 2, or contradicted its own exhibit in any respect, because part 2 was always a part of the original policy which was offered in evidence by the plaintiff.

The Court of Appeals said (R. 743) in its first opinion:

> "For some reason not entirely apparent, part 2 was also offered by the defendant and received in evidence as its Exhibit 5."

The complete and apparently satisfactory explanation was made in our reply to the petition for rehearing (R. 798, 799), substantially as now made, because the second opinion did not refer to the point.

We need not refer to the authorities cited by petitioner as to the right of a party to impeach his own exhibit, because it is clear that the exhibit which Dr. Rubens contradicted was part 2, which was incorporated in the policy pleaded *in haec verba* in plaintiff's complaint, and which was introduced as plaintiff's exhibit as part of Plaintiff's Exhibits 1 and 2.

The only way Dr. Rubens contradicted this part 2 (part of Pltfs. Exs. 1 and 2) was by saying that Frank Obartuch

did not sign in his presence. Dr. Rubens' signature was merely a testimonial, as a witness to the signature, and under the authorities heretofore cited, the testimony did not violate the Parol Evidence Rule.

Much is said by petitioner in her argument on the facts (which have been decided against her by both lower courts) as to the date of the examination, June 11, 1931, in connection with the date of Rubens' testimonial certificate as to the signature of Frank Obartuch. Both parts 2 and 3 are dated June 11, 1931. Part 3 contains the Doctor's report on the examination of the subject's urine. It is not denied that this examination was made on the following day which would be June 12, 1931 (R. 124). It thus becomes rather obvious that the Doctor had the habit of dating all the papers as of the date of the examination. But plaintiff did not see fit to cross-examine on this subject; after having taken his deposition in advance of trial (R. 132), plaintiff seems to have been strangely uninterested in "why" Dr. Rubens signed or used the date of June 11, 1931. This would have been proper cross-examination for plaintiff but improper direct examination by defendant of its own witness.

Petitioner Is Also Wrong as to the Law.

Petitioner is quite apologetic about the Illinois cases cited (Brief, p. 11) to the effect that one may not contradict a document introduced. None of the cases cited by petitioner is a well considered opinion and as petitioner acknowledges, there is a conflict of authority—it may safely be said that the weight of authority is against the uncited and undiscussed language of the cases relied upon. Illinois has always held that a party or other witness might be contradicted, although not impeached (*Chance* v. *Kinsella*, 310 Ill. 515, 523) and there seems to be no good reason why a different rule should be applied to documentary evidence.

If it can be said at all, that respondent re-introduced part 2, in view of the record above set forth, it was merely because it was the reverse side of part 3. The rule is uniformly stated that when a document is introduced for a specific purpose, such as to impeach for fraud, the party introducing may contradict.

20 Am. Jur. (Evidence), Sec. 915, p. 771-2.

Snell Isle v. *Com'r. Int. Rev.* (C. C. A. 5th), 90 F. 2d 481, cert. denied, 302 U. S. 734.

There is an additional reason why petitioner's point is not well taken, and that is because there is no place in the record in the trial court where there was any objection made upon the ground that the defendant was impeaching a document which the defendant had introduced. Trial counsel for the plaintiff in the District Court well knew that he had introduced part 2 as a part of the insurance policies in suit, and that the defendant had not introduced part 2, because there was no necessary reason for introducing it when it was already in evidence. Therefore, trial counsel made no objection upon this ground, and it was too late for the plaintiff's present counsel to first raise the question in the Court of Appeals.

IV.

The Defense of Substitution of a Person Other Than the Named Insured at the Medical Examination, Is Not Precluded by the Incontestable Clause, Under the Law of Illinois or Elsewhere.

The Illinois cases cited at page 15 of petitioner's brief, as well as the decisions of the Seventh Circuit Court of Appeals there cited, apply to the ordinary cases of fraud arising under the incontestable clause.

There is not a case in Illinois nor anywhere else that we have been able to find, and certainly none has been

cited by petitioner, which holds that the incontestable clause does apply where there has been a fraudulent substitution or impersonation at the medical examination.

All of the cases in this country which have passed upon the question of substitution, have held that where there was an impersonation at the medical examination, there was no contract, and therefore, no incontestable clause to apply.

All the text writers and annotators have taken the same view,—that this defense may be presented notwithstanding the incontestable clause.

There is no decided case which makes the distinction counsel attempts, that the signature upon the application, makes the slightest difference upon the question of law presented as to the substitution or impersonation at the medical examination.

The decided cases upon substitution are throughly discussed in the first opinion of the Court of Appeals (R. 740-742).

The only substitution case in Illinois holds that the incontestable clause does not apply,—*Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196, 23 N. E. 2d 922.

The record will be searched in vain for any statement by respondent's attorney that it waived any defense. As we have shown, under Point I there was no limitation of the issues or waiver of any defense by respondent.

The first opinion of the Circuit Court of Appeals (R. 739, 740) shows that the reason of petitioner for grasping at the reed of waiver is to escape the *rationale* of the substitution cases, for certainly petitioner has never contended and could never contend that the substitution cases can be distinguished otherwise. But the record fails to support her contention that there was either a limitation or waiver.

There is an important reason why the fraudulent act

of substitution at the medical examination is more important than fraudulent representations or fraudulent intent to commit suicide, such as was involved in the incontestable clause cases cited by petitioner (Brief, pp. 15-16). The rule is well stated in the *Maslin* case, 3 Fed. Supp. 368, at p. 370:

> "It is a rule applicable to contracts generally that where a man, pretending to be someone else, goes in person to another and induces him to make a contract, the resulting contract is with the person actually seen and dealt with and not with the person whose name was used. *Phelps* v. *McQuade*, 220 N. Y. 232, 115 N. E. 441, L. R. A. 1918B, 973; *Eastern Exchange Bank* v. *Fidelity & Deposit Co.*, 245 N. Y. 340, 157 N. E. 260, 52 A. L. R. 1373; *Gotthelf* v. *Shapiro*, 136 App. Div. 1, 120 N. Y. S. 210, *Robertson* v. *Coleman*, 141 Mass. 231, 4 N. E. 619, 55 Am. Rep. 471; *United States* v. *National Exchange Bank* (C. C.), 45 F. 163; Williston on Contracts, § 1517; Ashley, Mutual Assent in Contracts, 3 Columbia Law Review, pages 71, 73, 74."

This general rule of law is also announced in 23 R. C. L., Sect. 113, p. 1298.

See also annotation 98 A. L. R., page 710.

There is an additional rule of law which is not referred to by the Court of Appeals, which renders invalid a contract where there is a fraudulent substitution, which is well stated in 17 C. J. S. sec. 144(d), p. 499, as follows:

> "d. Identity of Parties.
>
> "Mistake respecting the identity of parties to the contract will invalidate it, although the doctrine is inapplicable where the mistake relates to the property rather than to the identity of the person contracted with.
>
> "There is no agreement where one party enters into the contract under a mistake **as to the identity of the other party**, as where the party contracted with has falsely represented himself to be another, or has accepted an offer meant for another."

Among the numerous cases cited in support of this rule are:

Arkansas Smelting Co. v. *Belden Co.*, 127 U. S. 379, 387, 388.

McClanahan v. *State Automobile Mutual Insurance Co.* (Tenn.), 108 S. W. 2d, 1102.

Gallopin v. *Continental Cas. Co.*, 290 Ill. App. 8, 7 N. E. 2d, 771, 773.

Colt Co. v. *Grubbs* (Ky.), 263 S. W. 749, 751.

The facts stated by petitioner (Brief, p. 16), in connection with the citation of the case of *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35, like many other facts stated in the petition and brief, are not entirely accurate, but we have not attempted to correct all of the misstatements, as it would unduly prolong this brief. As to the statement that Dr. Rubens testified that Friedman introduced him to the person represented to be Frank Obartuch, the record shows that Dr. Rubens so testified in his deposition in advance of trial, but in his testimony at the trial said that (R. 132):

> "I know that during the deposition that I testified that Mr. Friedman was there, but since then I have thought the thing over and I am not so sure whether he was or not."

Likewise the quotation from the cited case, *Guardian Mutual Life Ins. Co.* v. *Hogan*, 80 Ill. 35, is not entirely fair. It is taken out of the context and the facts were not the same in any respect. The insured, Hogan, does not seem to have either been examined or to have signed any application for the policy. The question was treated as a matter arising upon the pleadings as the court said (pp. 39-40):

> "Although it may be otherwise upon the proof upon any question as to the validity of the policy, as respects the form of the declaration, we regard the company as concluded from making any such objection. With knowledge of the facts, the agents of the com-

> pany allowed, and were instrumental in causing, the transaction of the insurance to assume the form which it did, and in framing the declaration upon the policy, the plaintiff was justified in treating it according to its purport, and **upon a mere question of pleading,** the company should not be heard to make the objection, that the transaction was different, in fact, from what it purported to be by the policy."

It is important to remember that the trial court specially found that Dr. Rubens "did not know that the person examined by him who gave the name of Frank Obartuch, was not in fact the real Frank Obartuch, nor did defendant company, at the time it issued the policies in suit, know that the person examined by its medical examiner was not in fact Frank Obartuch, deceased" (R. 712).

This is a sufficient answer to the insinuations that Rubens or Friedman or someone else on the part of the company, was a party to the fraud.

V.

Petitioner Has Not Shown Grounds for the Issuance of a Writ of Certiorari.

The opinion of the Court of Appeals upon rehearing (R. 814-16) sufficiently distinguishes the decision in *New York Life Ins. Co.* v. *Stewart,* 69 F. 2d, 957, so as to demonstrate that there is no occasion for taking jurisdiction because of a supposed conflict of Federal decisions.

The cases cited by petitioner (*R. R. Co.* v. *R. R. Co.,* 199 U. S. 160, 166, and *R. R. Co.* v. *Schuette,* 103 U. S. 118, 143) holding that where a case is decided upon two grounds, as for instance in the 199 U. S. case, (1) the terms of a contract, and (2) the statute, are in nowise applicable. In the Stewart case, but one ground for decision was announced, that plaintiff's insured could not hold the policy, with the false answers in the application as a part thereof, and then

the beneficiary sue upon the policy and have the medical examiner testify that he had transcribed the answers untruthfully.

No case has been cited by petitioner, that the insurance company may not impeach the signature of its medical examiner for fraud of the person examined or for fraud of the medical examiner, because its medical examiner is not acting as its agent when defrauding the insurance company (*Mutual Life Ins. Co.* v. *Hilton-Green*, 241 U. S. 613, 622).

We have previously shown that there is no conflict with Illinois decisions which hold that a party may not dispute or contradict its own exhibits, because the facts indisputably show that defendant-respondent did not contradict, dispute or impeach exhibits introduced by it.

The decision in the Circuit Court of Appeals is not in conflict with the Illinois decisions as to the incontestable clause, because none of the cited decisions was a fraudulent substitution case and the only Illinois case passing upon the question of a fraudulent substitution at the medical examination, holds that the incontestable clause does not apply. (*Valant* v. *Metropolitan Life Ins. Co.*, 302 Ill. App. 196, 23 N. E. 2d 922.)

The cases cited to the effect that the insurer may not dispute a recital in an issued policy acknowledging receipt of payment of premium, are likewise sufficiently distinguished by the opinion of the Court of Appeals (R. 743).

Conclusion.

In the "conclusion" of petitioner it is suggested that there is a question of policy involved, among other things, because the signature of the named insured was "certified to by the insured's agent." In this connection we call attention to the fact that while objection was made to Dr. Rubens' testimony upon the ground that it violated the Parol Evidence Rule, she did not object when the agent

Friedman testified that he signed in the absence of Frank Obartuch, and that he did not see the signature "Frank Obartuch" attached to the various documents which he witnessed (R. 315).

We suggest that there is no danger in the honest case of the medical examiner denying that the person examined was the person named; that in the honest case there would be no difficulty in the named insured's beneficiary proving that the named insured was the one who was examined; for instance, in the honest case, the dimensions of the man examined would coincide with those of the man named in the policy, whereas in this dishonest case, the dimensions and other descriptions of the man examined did not coincide or compare with those of the real Frank Obartuch (R. 116, Wiczas 167, Ruttenberg 238-9, Friedman 330, Dobija 286, Sepancki 181, Dankowski 219, Lewakowski 291); in the honest case, the named insured would have received the premium notices and paid the premiums. In this case Frank Obartuch's sons took positive steps to cause the premium notices to be sent to Michael's office so that Frank would not get them (R. 646-47); the premiums were paid by the sons and Frank was destitute (R. 171, 174, 185, 186, 276).

In the honest case, the person examined would have told his correct age to the doctor examining him and the beneficiary would have no difficulty showing this was the true age; in this case, the man examined stated to the doctor (R. 79-110), that he was 50 years of age, born October 4, 1881. In his Pauper's affidavit Frank Obartuch said he was 64 in 1934 (R. 143), as he did in his complaint filed against his family to recover his real estate (R. 234). Plaintiff stated under oath in this real estate suit that her husband was 64 years of age in 1934 (making Frank 61 at the examination date in 1931), and her affidavit was notarized by her attorney-son Michael (R. 150-152).

There are many other reasons which might be suggested why the honest case will take care of itself.

On the other hand, life insurance companies would be helpless if some one could be substituted for the medical examination and they could be required to contract with persons other than those they intended to insure. As has been aptly said in all the decided cases, life insurance companies insure lives and not names.

The Parol Evidence Rule was never intended to protect and shield fraud, nor has it ever been successfully invoked to make a contract, where a contract would not exist unless the Parol Evidence Rule was used.

We submit it would be an outrage upon justice to hold that there was a valid policy, when Frank Obartuch never knew that he had applied for insurance, never wanted insurance, attempted to change the beneficiaries in all the policies about which he knew, and certainly never desired to have $20,000 of insurance payable to his widow from whom he was estranged, when he never paid a nickel on the premiums and there is not a syllable of truthful testimony in the record that he ever participated in any way in either getting or perpetuating the policies.

We respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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